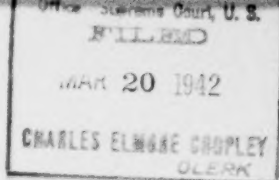


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. **1057**

INLAND STEEL COMPANY, A CORPORATION,
Petitioner,

vs.

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT,
AND BRIEF IN SUPPORT THEREOF.**

CARL MEYER,
FREDERIC BURNHAM,
HERBERT A. FRIEDLICH,
Counsel for Petitioner.



INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI.....	1
Questions presented	2
Statute involved	4
Statement	4
Reasons for allowance of writ	8
Jurisdiction	3

BRIEF:

Opinions below here sought to be reviewed (Rec. 250)	12
Opinion below in previous litigation on same con- troversy (Appendix)	12
Jurisdiction	3
The facts	4
Argument	13

SYNOPSIS OF ARGUMENT.

1. The two decisions rendered by the Circuit Court of Appeals for the Seventh Circuit in the same controversy are in direct conflict..... 13

In the first case the plan of dissolution was before the Circuit Court of Appeals in its entirety and it had full power to enjoin the proposed sale as well as the dissolution, if either were fraudulent 15

The Circuit Court of Appeals' affirmance in the first case of the District Court's decree that the proposed dissolution and sale were in no wise fraudulent was necessarily an adjudication that Steel Company's purchase of the ships was not a fraud on the minority stockholders of Steamship Company and was therefore in direct conflict with the court's second decision, which held that the carrying out of the dissolution and sale as planned constituted a fraud 15

The affirmance without prejudice to respondents' right to again present the facts, together with such further facts, if any, as might give rise to a cause of action in equity by a minority stockholder, did not prevent the first decision from being final on the validity of the proposed dissolution and purchase of the subsidiary's assets by Steel Company, when it transpired that no "further facts" occurred beyond the very things which the court had full jurisdiction to consider in the first case. A dismissal without prejudice does not permit a subsequent relitigation of the same issue... 15

2. The decision of the Seventh Circuit Court of Appeals that a parent corporation, which has legally dissolved its West Virginia subsidiary pursuant to statute, has committed a breach of trust and perpetrated a fraud on the minority stockholders of the subsidiary in purchasing the subsidiary's only salable assets and using them in its business is in conflict with the Circuit Court of Appeals for the First Circuit..... 17

3. When a majority stockholder of a solvent prosperous West Virginia subsidiary votes in its own interest and against the interest of the minority stockholders of such subsidiary to dissolve it and purchase such subsidiary's physical assets at the dissolution sale, the majority stockholder commits no breach of trust and no fraud on the minority. The holding of the Circuit Court of Appeals for the Seventh Circuit to the contrary is in conflict with the law as announced by the West Virginia Supreme Court of Appeals that a sale to the majority will be upheld if fair, and that a stockholder may vote in his own interest against the interests of other stockholders..... 19

4. The Circuit Court of Appeals departed from the usual course of judicial proceedings in such a manner as to call for an exercise of this Court's power of supervision when it went beyond the issue, which was whether plaintiffs were entitled to an accounting from defendant, and having held that they were, laid down the measure of damages, which was a question not argued in the case..... 22

TABLE OF CASES.

Arkadelphia Co. v. St. Louis Southwest Ry. Co.	249
U. S. 134, 147.....	15
Carter v. Carter Coal Co., 298 U. S. 281, 287-288.....	15
Lebold, et al. v. Inland Steamship Company, 82 Fed.	
(2d) 351	13
Lebold, et al. v. Inland Steel Company (not yet re-	
ported) (Rec. p. 250)	13
May v. Midwest Refining Co., 121 Fed. (2d) 431, 438-9.9, 18	
Pennsylvania v. West Virginia, 262 U. S. 553, 592, 593.	15
Pepper v. Litton, 308 U. S. 295, 306; 60 S. Ct. 238..	19, 21
Pierce v. Society of the Sisters, 268 U. S. 510, 536....	15
State of Missouri v. Chicago, Burlington & Quincy	
Railroad, 241 U. S. 533, 539.....	15
Swift & Company v. U. S., 276 U. S. 311, 326.....	15
Thurmond v. Paragon Colliery Co., 82 W. Va. 49, 53;	
95 S. E. 816, 817 (1918) (W. Va. Sup. Ct. of Ap-	
peals)	10, 21
Tierney v. United Pocahontas Coal Co., 85 W. Va.	
545, 559; 102 S. E. 249 (1920) (W. Va. Sup. Ct. of	
Appeals)	10, 19
Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65,	
82	15
Window Glass Machine Co. v. New Bethlehem Window	
Glass Co., 264 Fed. 822 (3 C. C. A.).....	15
Window Glass Machine Co. v. New Bethlehem Window	
Glass Co., 269 Fed. 979 (3 C. C. A.).....	16

STATUTES.

Sec. 80, Art. 1, Chap. 31 of the Code of West Virginia	
on Corporations, also cited as Sec. 3092, West Vir-	
ginia Code of 1937.....	4

APPENDIX.

C. C. A. (7th) opinion in Lebold, et al. v. Inland Steam-	
ship Company, 82 Fed. (2d) 351.	

IN THE
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INLAND STEEL COMPANY, A CORPORATION,
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Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioner, Inland Steel Company, by Carl Meyer, Frederic Burnham and Herbert A. Friedlich, its attorneys, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 29, 1941, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division.

The case involves the claim of respondents, minority stockholders of Inland Steamship Company, a West Virginia corporation (which was an eighty per cent owned sub-

subsidiary of petitioner, Inland Steel Company, and whose business consisted entirely of the carriage of petitioner's freight) that, by (i) causing the dissolution of Steamship Company in accordance with the applicable West Virginia statute, (ii) purchasing Steamship Company's assets, three freight steamships, at the dissolution sale for their full fair market value and (iii) thereafter employing said ships to carry cargoes belonging to petitioner, petitioner had fraudulently used its dominant majority position to force the Steamship Company out of a prosperous going business and had appropriated that business to itself, and was therefore liable in damages to the minority stockholders for the going concern value of the minority interest as though said interest had been fraudulently converted by the majority to its own use.

QUESTIONS PRESENTED.

1. Whether a Circuit Court of Appeals, after having first, in prior litigation between the same interests, affirmed the District Court's refusal to enjoin (a) a proposed dissolution of a prosperous going West Virginia subsidiary pursuant to statute, and (b) the proposed purchase of its physical assets by its parent corporation at the dissolution sale, all of which the minority stockholders of said subsidiary then claimed would result in a fraudulent breach of the trust owed the subsidiary and the minority by the parent corporation, and a fraudulent usurpation of the business of the subsidiary and the minority's interest in it, and after having held, in such prior litigation, that the majority might proceed with the contemplated dissolution and purchase such assets, may then, in a subsequent appeal by the minority from an adverse decree in a case brought against the parent corporation to recover damages because of the very same dissolution, decree that the dissolution, which had been carried out exactly as projected and described

in the injunction bill, and admitted by defendant in its answer thereto, was a breach of trust by the parent corporation and a fraudulent appropriation by it of the business of the company.

2. Whether, under the laws of West Virginia and the statute of that State which permits the owner of sixty per cent of the capital stock of a corporation to dissolve it, it is a breach of trust and a fraud on the minority for a parent corporation, owning the requisite percentage of stock, to dissolve its prosperous going subsidiary against the interests of the minority stockholders thereof and to purchase the assets of said subsidiary at the dissolution sale for the full fair value thereof, and to employ said assets, which have no peculiar value beyond asset value, as instrumentalities of service just as they had theretofore been employed when operated by the subsidiary.

3. Whether the Circuit Court of Appeals, upon reversing a District Court decree which dismissed for want of equity a bill for an accounting, may, in addition to remanding the case with instructions to proceed to the assessment of damages, lay down a rule for the measure of damages which was not an issue before the Circuit Court of Appeals and had not been argued by the parties.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered December 29, 1941. (Rec. 250.) The petition for rehearing was filed within the time prescribed by the rules of court (Rec. 260), and was overruled on February 17, 1942. (Rec. 305.) Jurisdiction is invoked under Section 240(a), c. 229 of the Act of February 13, 1925, 43 Stat. 936, 28 USCA § 347(a).

STATUTES INVOLVED.

The West Virginia statute governing voluntary dissolution in effect at the time of the dissolution in this case is § 80, Article I, ch. 31 of the Code of West Virginia on Corporations, West Virginia Code of 1937, Sec. 3092. It is set out at Record, p. 135. The pertinent provisions thereof are as follows:

“§ 80. Voluntary dissolution. * * *

The stockholders at any time may resolve to discontinue the business of the corporation, at least sixty per cent of the shares of capital stock entitled to vote being present at the meeting and voting in favor of such discontinuance, and may divide the property and assets among those entitled thereto, after paying all the debts and liabilities of the corporation.”

STATEMENT.

Inland Steamship Company was organized in 1911. (Rec. 79.) Throughout its existence it was merely an instrumentality of Steel Company, exclusively engaged in transporting Steel Company's iron ore, limestone and coal by freight steamships from Steel Company's mines to its mills. (Rec. 192.)

The company was organized under the laws of West Virginia, which at the time of the company's organization and thereafter always permitted the owners of at least sixty per cent of the capital stock to discontinue the business of the company at any time. (Rec. 135, 196.) Steel Company always owned at least sixty per cent of the capital stock, and at the time of dissolution owned eighty per cent thereof. Respondents owned eighteen per cent of the stock.

Petitioner was under no obligation, prior to dissolution of the Steamship Company, to tender its cargoes to the Steamship Company for carriage as there was no contractual arrangement of any kind between the two companies as to the carriage of Steel Company's freight. (Rec. 194.)

However, Steel Company had always paid Steamship Company the regular going freight rates. (Rec. 192.) The latter company, accordingly, made large profits and paid large dividends. (Rec. 197.) This redounded solely to the benefit of the minority stockholders. As far as Steel Company was concerned it merely meant that the same percentage of total freight carried as the percentage of the capital stock owned by it was carried at cost, the excess above this cost coming back to it as dividends from its stockholdings. (Rec. 58.)

In 1934 Steel Company determined to carry its freight at cost, either in its own ships, or in those of a wholly owned subsidiary. There were definite reasons for regarding this as advantageous. (Rec. 81, 158, 164.) It also felt that the situation which permitted the minority to receive dividends out of traffic which was wholly produced, owned, managed and controlled by Steel Company was subject to criticism by stockholders of Steel Company. (Rec. 99, 168.) Therefore Steel Company sought to purchase the minority interest for \$700 per share, the admitted physical asset value. Being unsuccessful in this, it determined to dissolve the company and, with the proceeds of the dissolution sale, to establish a wholly owned fleet, preferably by the purchase of new ships (two of the then existing fleet being somewhat obsolete), or, if necessary to the protection of its investment, by the purchase of the ships in question. (Rec. 97.) These ships were ordinary lake freighters of which there was at that time a large over-supply. (Rec. 97, 195.)

When Steel Company called a dissolution meeting, respondents filed a bill to enjoin the dissolution. They charged that Steel Company wished to acquire complete ownership of the assets of Steamship Company, and had announced that, if it could not buy the minority interest for \$700 per share, it would dissolve the company, purchase the assets, and thereupon continue to operate the ships and business as heretofore; that this would amount

to the perpetration of a fraud on the minority. (Rec. 143-146.)

Steel Company answered, admitting that it intended to dissolve the company, and would bid for the ships an amount sufficient to protect its investment therein (an amount equal to \$700 per share of Steamship Company stock), but that if third parties should bid in excess of such amount, it would be willing to permit them to purchase the ships. (Rec. 158.) Besides stating the various reasons which made a wholly owned subsidiary preferable, such as possible mergers and then proposed federal legislation, Steel Company took the position that the freight, which originated with and belonged to it, should properly be transported in its own ships at cost. (Rec. 157.) The testimony was to the same effect. (Rec. 81, 95-97.)

Upon a hearing the District Court dismissed respondents' bill for want of equity and in its findings and conclusions stated that the contemplated dissolution and sale would not result in the perpetration of a fraud upon the minority, that the dissolution should proceed, that all of the company's assets should be sold at public sale for the highest and best price obtainable, and that Steel Company was at liberty to bid for said assets at said sale. (Rec. 169-170.)

Respondents appealed. The Circuit Court of Appeals for the Seventh Circuit affirmed the District Court and laid down the principle that a West Virginia corporation can be dissolved upon vote of sixty per cent of its capital stock "regardless of motive and expediency" (Appendix, p. v); that a court of equity may not interfere with the statutory right of the majority to force dissolution and sale of the assets unless the evidence discloses an unfair advantage over the minority stockholders, (Appendix, p. v); and that the majority may not force a sale to itself at less than the full value (inferentially that the majority may sell to itself at full

value). The opinion stated that the majority might proceed to dissolution (Appendix, p. vi); that the District Court was justified in its conclusion that the circumstances up to that time were not such as to create a cause of action in the minority stockholders, and that the decree should be affirmed, but that the affirmance would be without prejudice to the right of the minority thereafter to present the same facts in connection with such other facts, if any, as would bring about a situation within the doctrine recognizing causes of action in minority stockholders. (Appendix, p. ix.)

Thereupon the dissolution proceeded. The ships were sold to Steel Company, the only bidder, at a widely advertised public sale, for their admitted fair asset value, \$1,120,000, and the proceeds of the sale were ratably distributed to the stockholders. (Rec. 208.) Respondents, after accepting and keeping their share, brought a bill to recover damages for alleged fraudulent dissolution and appropriation of Steamship Company's business. The court referred the cause to a Master to report solely on the question of liability to account. (Rec. 37.) He reported that there was no fraud and no liability. (Rec. 202.) The District Court affirmed the Master, with full findings of fact and conclusions of law, and dismissed the bill for want of equity. (Rec. 223.) This second case (the instant case) was heard on the record in the first case, plus evidence of the sale and distribution which is not claimed to have been in any way unfairly held or made, and which were carried out exactly as it was charged in the first complaint they would be carried out, and exactly as it was then admitted they would be carried out.

The minority again appealed to the United States Circuit Court of Appeals for the Seventh Circuit. The appeal was heard by the same judges as before. The Court of Appeals reversed the District Court and held that, although it was legal for Steel Company to bring about a

dissolution of Steamship Company, Steel Company was a trustee for the minority stockholders, and through its officers had been faithless to its trust in purchasing the ships and continuing to use them to carry its own freight; that the dissolution was a mere device by means of which Steel Company appropriated for itself the transportation business of Steamship Company; that Steel Company was liable to respondents for the value of respondents' interest in Steamship Company, less the amount received from the sale of the ships; that said interest was to be measured as of a time prior to dissolution, just as though the company was never to be dissolved but was to continue indefinitely as a prosperous going concern, carrying the freight of Steel Company as it had in the past.

REASONS FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision rendered by the same court and the same judges in former litigation between the same interests on the same matter, viz., an important question of corporation law as to whether a fraud is perpetrated upon the minority stockholders of a West Virginia subsidiary, legally dissolved pursuant to statute, when the parent corporation, which has brought about the dissolution, purchases the assets at the dissolution sale for their full fair value and uses them in the same manner as they had been employed by the subsidiary, it being conceded that said assets have no value beyond mere physical asset value.

The Circuit Court of Appeals in the first appeal refused to enjoin such dissolution and sale, but stated that the dissolution might proceed. After such dissolution and sale had taken place, exactly as the injunction bill had charged was planned, and the answer had admitted would be done, the minority stockholders sued for damages, and

the same Circuit Court of Appeals, in the minority's appeal from the dismissal of their second bill, held that the majority stockholder had defrauded the minority stockholders by purchasing the assets at the dissolution sale for their full fair value, and was liable to the minority stockholders as though their interest had been converted by the majority to its own use. These two decisions are directly conflicting and cannot be reconciled.

2. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision rendered by the Circuit Court of Appeals for the First Circuit on the important question of corporation law, viz., whether, in a dissolution brought about by the majority, it can be said to have fraudulently appropriated the business of the dissolved company when it purchased the only saleable assets at the dissolution sale for an admittedly fair price and proceeded to use them in its business.

The Circuit Court of Appeals for the Seventh Circuit in this case has decided that such a purchase is fraudulent. The Circuit Court of Appeals for the First Circuit in the case of *May v. Midwest Refining Co.*, 121 Fed. (2d) 431, 438-9 (June 6, 1941) has decided that such a purchase was not fraudulent.

3. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, the question being whether **a parent corporation of a West Virginia subsidiary commits a breach of trust and perpetrates a fraud upon the minority stockholders of such subsidiary, and fraudulently converts to its own use the interest of the minority stockholders in such subsidiary, and fraudulently appropriates the business of such subsidiary, when it causes said subsidiary to be legally dissolved against the interests of said minority stockholders, purchases the physical assets there-**

of at the dissolution sale for a fair price, and uses said assets in the parent company's own business.

The Circuit Court of Appeals for the Seventh Circuit in this case has held that since it was detrimental to the interests of the minority stockholders of its subsidiary, Inland Steamship Company, it was a breach of trust and a fraud on the minority for Inland Steel Company, the parent corporation, to vote the dissolution of its West Virginia subsidiary pursuant to the applicable West Virginia statute, and purchase at the dissolution sale, for an admittedly fair price, the ships of Steamship Company, three ordinary Great Lakes freighters of no peculiar value, and to use said ships to carry Steel Company's freight just as they had been used before Steamship Company was dissolved.

In *Tierney v. United Pocahontas Coal Co.*, 85 W. Va. 545, 559, 102 S. E. 249, (1920), the Supreme Court of Appeals of West Virginia held that the sale of a corporation's property to the majority was not fraudulent if it was for a fair price and did not prejudice the rights of any interested party.

In West Virginia a stockholder may vote in his own interests even though against the interests of other stockholders. In voting he is not a trustee. *Thurmond v. Paragon Colliery*, 82 W. Va. 49, 53, 95 S. E. 816, 817 (1918).

4. The Circuit Court of Appeals for the Seventh Circuit has departed from the accepted and usual course of judicial proceedings in such a way as to call for an exercise of this Court's power of supervision in that it has laid down a rule for the measure of damages in an accounting, although the only question before the court was whether there should be an accounting.

The question before the Circuit Court of Appeals was whether the District Court was right in dismissing for want of equity a bill brought by the minority stockholders of a subsidiary corporation, claiming that they had been dam-

aged because the subsidiary's parent had dissolved it, purchased its assets, and used them in the parent's own business. The Circuit Court of Appeals reversed and remanded the case, but, in doing so, went beyond the issue as to whether defendant was liable to plaintiffs and should account, and laid down the rule of damages to be applied in such accounting, although that was not yet an issue in the District Court or in the Circuit Court of Appeals, and had not been argued in the case.

It is respectfully submitted that the writ of certiorari herein prayed for should issue for the reasons urged.

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